Supreme Court, U.S.
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No. 93-1964

In The
Supreme Court of the United States
October Term, 1993

AMERICAN BONDING COMPANY
Petitioner,

v.

TRUSTEES OF THE CARPENTERS FOR SOUTHERN NEVADA HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND CARPENTERS JOINT PENSION TRUST FOR SOUTHERN NEVADA; TRUSTEES OF THE VACATION TRUST CARPENTERS UNION NO. 1780 AND TRUSTEES OF THE SOUTHERN NEVADA CARPENTERS AND MILLWRIGHTS APPRENTICESHIP TRAINING TRUST,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF IN OPPOSITION

KRISTINA PICKERING
MORRIS BRIGNONE & PICKERING
1203 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 474-9400
Attorneys for Respondents

39 pp

QUESTIONS PRESENTED

1. Nevada law requires contractors to post bonds covering claims for unpaid labor and supplies. The bonds issued in compliance with Nevada law include coverage for fringe benefits as part of their coverage for labor. One of the questions presented here is whether a compensated surety that provided such a bond can avoid liability on the fringe benefits component of its defunct principal's labor debts on the grounds that, because the entity seeking to enforce the liability is an ERISA plan, recovery is preempted by ERISA.

2. The other question presented is whether this Court should review a state court case that (a) has no precedential value because it is unpublished; (b) involves an issue that will, in all likelihood, soon be resolved by the legislature; and (c) contains unique facts limiting its precedential impact.

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STATUTES INVOLVED

This case involves the following statutes:

1. 29 USC § 1132(d)(1) which provides as follows:

> An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

2. 29 USC § 1144(a), which provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

3. 29 USC § 1144(b)(2)(A), which provides as follows:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

4. NRS § 691 B.010, which provides as follows:

> All contracts of surety insurance covering subjects located or to be performed in this state are subject to the applicable provisions of chapter 687B of NRS (the insurance contract), and to other applicable provisions of this code. (1971, p. 1779.)

5. NRS § 691B.030, which provides as follows:

> Any insurer which executes any surety contract as surety shall be estopped, in any proceeding to enforce the liability which it has assumed to incur, to deny its power to execute such contract or assume such liability. (1971, p. 1780.)

I.
STATEMENT OF THE CASE

The Nevada legislature has recognized that small contractors often underbid construction jobs in the hope of getting work and then find themselves unable to pay their workers. Many contractors declare bankruptcy. In response to this recurring problem, the Nevada legislature enacted the statutes here at issue. NRS 624.270 and 624.273 require contractors to post bonds covering claims for unpaid labor and supplies.[1] Bonds issued in compliance with these statutes include coverage for fringe benefits as part of their coverage for labor. *Genix Supply Co. v. Board of Trustees*, 84 Nev. 246, 438 P.2d 816 (1968).

Respondents are the Trustees of multi-employer Southern Nevada Carpenters Trust Funds ("Trustees").[2] The funds provide health, welfare, and pension benefits to individuals employed in the Southern Nevada construction industry. The plans the Trustees administer are qualified under the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").

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[1]NRS 624.270 and 624.273 are set out in the appendix to the petition for writ of certiorari, at Appendix C, pages 1-6. All references to the petition for writ of certiorari in this case will be abbreviated "Petition" followed by the pages(s) cited.

[2]Pursuant to Rule 29.1, respondents Trustees of the Carpenters for Southern Nevada Health and Welfare Trust; Trustees of the Construction Industry and Carpenters Joint Pension Trust for Southern Nevada; Trustees of the Vacation Trust Carpenters Union No. 1780; and Trustees of the Southern Nevada Carpenters and Millwrights Apprenticeship Training Trust (together "Trustees"), state as follows: the Trustees are not a corporation.

On May 4, 1990, American issued a $20,000.00 standard form Nevada contractor's surety bond to secure labor, materialmen's, and suppliers' debts incurred by National Forest Products, Inc. ("Forest"), a Nevada contractor. Forest executed a collective bargaining agreement, requiring it to make contributions to Trustees based on the hours its employees worked. Pursuant to the collective bargaining agreement, Forest submitted remittance reports to Trustees for the months of January through July 1991, but it failed to make any payment for the time on those reports. Forest filed for Chapter 11 protection under the United States Bankruptcy Code on November 26, 1991. Trustees brought a claim against American for the amount of the surety bond.

American moved for summary judgment, asserting that ERISA preemption defeated the Trustees' claims against it. Trustees responded and countermoved for summary judgment in their own right. On November 6, 1992, the lower state court issued an Order and Judgment granting Trustee's countermotion for summary judgment against American. The order declared American's $20,000 bond forfeit.

American appealed the decision to the Nevada Supreme Court. On January 20, 1994, the Nevada Supreme Court entered an order dismissing American's appeal. The Nevada Supreme Court concluded that the Nevada statutes at issue were "only remotely related to ERISA and are therefore not preempted by ERISA in cases such as the one at bar." The Nevada Supreme Court order remains unpublished. By order dated March 7, 1994, the Nevada Supreme Court denied rehearing.

II.
REASONS FOR DENYING WRIT OF CERTIORARI

A. This Court Should Deny American's Petition For Writ of Certiorari Because This Case Involves Unique Facts, Because This Case Will Have Limited Precedential Impact, and Because Legislation That Will Definitively Resolve the Very Issue Raised in This Matter Will, In All Likelihood, Soon Pass in Congress.

The Nevada Supreme Court order of which American Bonding complains remains unpublished. Because the order is unpublished, the case has no precedential impact whatsoever within the Nevada state court system. Nevada Supreme Court Rule 123 provides:

> An unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority except when the opinion or order is (1) relevant under the doctrines of law of the case, res judicata or collateral estoppel; or (2) relevant to a criminal or disciplinary proceeding because it affects the same defendant or respondent in another such proceeding.

Moreover, the Nevada Supreme Court takes the prohibition on citing unpublished orders seriously. In *State, Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 124, 676

P.2d 1318, 1320 (Nev. 1984), the Court chastised an attorney who cited unpublished orders and warned:

> ... in the future, when this court perceives a lack of regard for its rules or decisions, we may well impose sanctions such as striking a brief, dismissing an appeal, or finding a confession of error. Additionally, the attorneys involved may be referred to the bar for discipline.

Because this case is unpublished, no other party can rely on its holding, and the case can create no future conflict with any other decision, whether state or federal. Therefore, review of the Nevada Supreme Court's order would be of immediate importance *only* to the parties involved. And "[t]o remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 971, 102 S. Ct. 276, 280 (1982) (STEVENS, J., dissenting).

A second factor militating against a grant of certiorari is that legislation which will directly address the very question that American here presents is now making its way through Congress. Senate Bill 1580, introduced by Senator Arlen Specter, would definitively resolve this issue in favor of the Trustees by exempting from ERISA preemption "any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent

contributions to a multi-employer plan."[3] The House of Representatives has already passed a similar bill by a vote of 276 to 150. *See Kennedy Gives Strong Endorsement of Bill that Would Pre-Empt ERISA*, BNA Daily Labor Report, March 14, 1994.[4]

Senate Bill 1580 has every indication of passing within the next few months. During committee hearings, Senator Edward Kennedy, chairman of the Labor and Human Resources Committee, "stressed the importance of expediting the passage of the bill by the Senate because recent court decisions in many states 'have gone far beyond the original intent of ERISA, and vastly extended the reach of the preemption provision.'" *See Senate Panel Clears Bill to Bar State Prevailing Wage Laws from ERISA*, vol. 21, no. 16, BNA Pension & Benefits Reporter, p. 771 (April 18, 1994).[5] Supported by the Clinton Administration, the bill was favorably reported out of the Senate Committee on Labor and Human Resources.

This Court should not devote its scarce resources to resolving an issue that Congress is close to addressing in a definitive manner. As was recognized in *Watt v. Alaska*, 451 U.S. 259, 274, 101 S. Ct. 1673, 1682 (1981) (STEVENS, J., concurring), this Court should take into consideration the likelihood that Congressional action is forthcoming in deciding whether to grant a petition of certiorari. In his concurrence in the *Watt* decision, Justice Stevens noted that certain issues are "clearly a matter for

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[3]Senate bill 1580 is set out in the appendix.

[4]This Daily Labor Report article is set forth in the appendix.

[5]This article is set out in the appendix.

Congress to decide," and he added, "If Congress is displeased with the decisions of this Court and the Court of Appeals, it may promptly reverse them by revising the relevant statutes. If that is its view, it no doubt would have acted more promptly if we had simply denied certiorari." *Id.*

Further, once passed, the proposed legislation would render any decision the Court made in this matter meaningless by robbing the decision of all precedential value. This Court must not spend its limited time and energy issuing an opinion that "in no way promotes the development of the law." *Anderson v. Harless*, 459 U.S. 4, 12, 103 S. Ct. 276, 280 (1982) (STEVENS, J., dissenting).

Finally, if this Court were inclined to hear a case involving ERISA preemption, certain factors of this case minimize its precedential value. This case, which, in part, involves the issue of whether the two Nevada statutes fall under the ERISA insurance exception, is uncharacteristic of most cases involving ERISA preemption.

The issue of ERISA's insurance exception is more fully discussed below. Briefly, surety bonds are a form of insurance contracts under Nevada law, NRS 691B.010, whose validity Nevada insurers are estopped to deny. NRS 691B.030. American's duty to honor its assurances represents state "law which regulates insurance." Trustees' right to make claim against American based on its bond and the law applicable to its undertaking thus fall within ERISA's insurance exemption.

Justice Stevens, in a rare opinion supporting the denial of a petition for certiorari, stated that he "consider[ed] it entirely appropriate to disfavor complicated cases which turn largely on unique facts. A series of

decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." *Singleton v. Commission of Internal Revenue*, 439 U.S. 940, 945, 99 S. Ct. 335, 339 (1978).

III.
THE NEVADA SUPREME COURT CORRECTLY DECIDED THE MERITS OF THIS CASE

A. The Claim Asserted Does Not "Relate To" An Employee Benefit Plan Within The Meaning of 11 U.S.C. § 1144(a).

If this Court grants the petition for certiorari, then it should affirm the order of the Nevada Supreme Court. The order does not conflict with any "decision of another state court of last resort or of a United States court of appeal." Rule 10. In fact, the order of the Nevada Supreme Court comports with the principles established by other courts and by Congress itself in enacting ERISA.

While ERISA broadly preempts state laws that "relate to any employee benefit plan" covered by it (29 U.S.C. § 1144(a)), this preemption is "not limitless." *McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13, 17 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1939 (1992). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

The central case in this area of ERISA preemption is *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486

U.S. 825 (1988). At issue in *Mackey* were two Georgia garnishment statutes. The first specifically barred garnishment of "[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to [ERISA]." The second was Georgia's general garnishment statute, silent with respect to ERISA, which Georgia's courts applied to allow creditors to reach benefits due employees under ERISA-protected plans. This Court invalidated the specific, protective statute as preempted by ERISA, but upheld Georgia's general garnishment law, minus the exemption, as applicable to employee benefit plans and *not preempted.*

Mackey quoted *Shaw* in striking down the specific, protective statute: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference* to such a plan." *Mackey*, 486 U.S. at 829 (quoting *Shaw*, 463 U.S. at 96-97; *Mackey* Court's emphasis). Georgia Code section 18-4-22.1 by its terms "single[d] out ERISA employee welfare benefit plans." (*Id.*), and under *Shaw*, this "singling out" was fatal. *Mackey*, 486 U.S. at 838 n.12.

As noted, this Court, in *Mackey*, upheld Georgia's general garnishment laws, though applied by Georgia's courts to reach benefits due under ERISA benefit plans. It did so based on its determination of the intent of the Congress that enacted the original Employment Retirement Income Security Act of 1974. *Mackey*, 486 U.S. at 840. Elsewhere in that statute, the 1974 Congress gave ERISA plans the power to "sue or be sued," 29 U.S.C. § 1132(d)(1). Georgia's general garnishment laws, though burdensome to plan fiduciaries, merely provide a means of collecting judgments applicable to all creditors and all assets generally and are a necessary procedural incident to

the plans' power to sue and be sued. *Mackey*, 486 U.S. at 834, n.10. While garnishing benefits due under an ERISA plan brings Georgia's garnishment statutes into contact with Georgia-based ERISA plans, such contact is too general in application and remote in effect to be said to "relate to" an ERISA plan. This Court therefore rejected preemption as to Georgia's general garnishment laws.

In this case, American voluntarily undertook to issue Forest a contractor's bond. The bond, by its terms, protects creditors of American's principal, Forest, and the Trustees are such creditors. None of the statutes involved "single out" ERISA plans; nor do they impose a liability beyond that which American affirmatively undertook. Instead, the statutes refer to "labor" generically. Automatic preemption, like that found to exist in *Mackey* with respect to Georgia's specific garnishment statute, thus does not arise. The Trustees' right to make demand on and to enforce American's obligations under its bond are not preempted by ERISA, 29 U.S.C. § 1144(a).

In fact, if the Nevada Supreme Court had ruled in favor of American, it would have, in essence, exempted ERISA plans from the benefits of Nevada's contractor licensing statutes. Such an exemption would have impermissibly "singled out" ERISA plans. As American recognizes, "Under ERISA, the term 'state law' is defined broadly enough to encompass 'almost any imaginable legislative, judicial, or administrative action a state might take.'" Petition, p. 8, quoting *Marcoz v. Summa Corp.*, 106 Nev. 737, 743, 801 P.2d 1346, 1350 (1990). A decision by the Nevada Supreme Court to exclude only ERISA plans from the class of beneficiaries of NRS 624.270 and 624.273 would have unlawfully "related to" an ERISA plan. Under such a ruling, individual workers could pursue American for

the compensation Forest promised them, but ERISA plans would be precluded from bringing a similar action. Under ERISA's preemption provision, which prohibits state courts from issuing decisions that single out ERISA plans for special treatment, the Nevada Supreme Court could not have ruled in American's favor.

"[T]he question of whether a certain state statute is preempted by federal law is one of congressional intent," making "[t]he purpose of Congress ... the ultimate touchstone." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 138, 111 S. Ct. 478, 482 (1990). An inquiry into legislative intent demonstrates that Congress did not intend that surety obligations such as American's would be preempted by ERISA.

As originally enacted, the civil enforcement section of ERISA only provided for equitable proceedings. No federal cause of action to recover money judgments from delinquent employers existed. Because the absence of *any* action to collect money judgments would destroy ERISA's fundamental purpose to protect employee benefit rights, Congress could not have intended to preclude such causes of action under state law.

In 1980, Congress added provisions establishing a federal cause of action to recover delinquencies. 29 U.S.C. §§ 1145, 1132(g). However, this Court has emphasized that in interpreting the preemption clause of ERISA, the relevant congressional intent is the intent of the Congress that enacted the preemption clause. "We must look at the language of ERISA and its structure, to determine the intent of the Congress that originally enacted the provision in question. 'It is the intent of the Congress that enacted [the

section] ... that controls.'" *Mackey*, 486 U.S. at 840, citing *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

The Senate and House committees considering the original Act both stated:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. *The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts* and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants....

H.R. Rep. No. 533, 1974 USCCAN at 4655; S. Rep. No. 127, 1974 USCCAN at 4871 (emphasis added). The reference to "the full range of legal and equitable remedies available in both state and federal courts" would be meaningless, given ERISA's original limitation of ERISA-based remedies to equitable enforcement, had Congress intended collection suits like that at issue here to be barred.

The legislative history underlying the 1980 amendments to ERISA again clearly expresses Congress's desire to retain state law remedies in appropriate circumstances. In fact, the 1980 amendment was only intended to preclude state law remedies that provided for *lesser* damages than those provided for by Congress. Thus, H.R. Rep. No. 96-889(II) (Ways and Means Committee), 96

Cong. 1st Sess., reprinted in 1980 USCCAN 2993-3066 at 3037-3038, states:

> The Bill preempts any state or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages, or which would limit liquidated damages to an amount below the 20 percent level. However, the Bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such a higher level of liquidated damages is permitted under applicable state or other law. *The Committee amendment does not change any other type of remedy permitted under state or federal law with respect to delinquent multi-employer plan contributions.*

(Emphasis added.)

American cites *Trustees of Elec. Wkrs. H. & W. Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), and claims that the Nevada Supreme Court's order in this case conflicts with certain statements made by the *Marjo* court. However, *Marjo* involved facts entirely different from those present in this case. In *Marjo*, the court held that ERISA preempts application of a statute that holds general contractors responsible for the ERISA plan contributions that subcontractors fail to make on behalf of their employees. The court emphasized that under the statute "Grant [the general contractor] has had to defend itself against the suit for contributions as if *it* and not Desert Valley [the subcontractor] were the employer contractually bound to the Plans." *Marjo*, 988 F.2d at 866 (emphasis in *Marjo*).

In contrast, sureties such as American who, for a premium, voluntarily undertake to insure specific obligations of a contractor, are not "employers" or "fiduciaries" within ERISA's coverage but ordinary promissors, whose voluntarily assumed obligations are fully enforceable under applicable state law. State law does not require American to "defend itself against the suit for contributions as if it ... were the employer...." Instead, American is liable to Trustees because, as a surety, it voluntarily assumed Forest's obligations. The mere fact that Trustees administers an ERISA plan does not preclude its claim. American is liable to Trustees the same way that American would be liable to any other creditor of Forest.

The Nevada contractor licensing statutes at issue here do not attempt to affect the primary administrative functions of ERISA benefit plans. NRS 624.270 and NRS 624.273 merely permit recovery of wage claims from a compensated surety who agreed to pay them on its principal's default; they do not try to determine employer eligibility for fringe benefits, to increase fringe benefits, or to impose liability on one who does not undertake it voluntarily. The amount, terms, conditions and every other aspect of the pre-existing obligation to pay contributions to the plan remain exactly as the employer and the union agreed. The statutes in question only put employee benefit plans on an equal footing with all other wage claimants, who are entitled to recover their full wage. *See Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.) *cert. denied*, 493 U.S. 811, 110 S. Ct. 57 (1989) (a state statute changing the payee but not affecting the calculation of benefits is not preempted).

B. American Cannot Escape Liability On Its Bond Without Violating State Laws Regulating Insurance, Which Are Exempt From ERISA Preemption In Any Event.

There exists an even simpler answer to the preemption question American has raised. The insurance exemption stated in 29 U.S.C. § 1144(b) leaves the States free to enforce laws regulating insurance whether the laws "relate to" an ERISA plan or not.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S. Ct. 2380 (1985), is very nearly on point. At issue in *Metropolitan Life* was a statute mandating minimum mental-health-care benefits in all group health policies, including ERISA plan policies. The insurers in *Metropolitan Life* objected to the statute mandating the objectionable coverages and declaratory judgment proceedings were brought to decide the question. This Court found the law mandating the additional coverage "related to" the administration of ERISA plans and so was preempted under 29 U.S.C. § 1144(a). However, it went on to find the state statute mandating the coverage to be a law regulating insurance within the meaning of 29 U.S.C. § 1144(b)(2)(A), and upheld the Massachusetts statute on that basis.

American posits NRS 624.270 and NRS 624.273, as interpreted in *Genix Supply*, as in effect mandating coverage for Nevada contractors' ERISA plan contributions. Accepting this characterization, *arguendo*, as accurate, American's ERISA preemption argument fails under *Metropolitan Life*. By statute, Nevada makes contracts of surety insurance no different from any other contract of insurance and fully subject to its insurance code. NRS

691B.010. If Nevada's contractors' bond statutes "relate to" ERISA plans, it is only by reason of the coverages they mandate. Laws mandating certain coverages comprise the "business of insurance" under *Metropolitan Life* and are exempt from the preemption debate.

Nevada's Insurance Code provided a proper basis for the Nevada Supreme Court's order:

> Any insurer which executes any surety contract as surety shall be estopped, in any proceeding to enforce the liability which it has assumed to incur, to deny its power to execute such contract or assume such liability.

NRS 691B.030. American has taken Forest's money, issued the bond, and let creditors, including Trustees, rely on the bond. It cannot now complain that the coverages it mandatorily includes under NRS 624.273 are preempted by ERISA and therefore not available.

IV.
CONCLUSION

This Court should not devote its limited resources to reviewing this matter. The Nevada Supreme Court order at issue remains unpublished and will create no future conflict with any case, whether state or federal. Any conflict that may exist will be limited to the parties involved. This Court has expressed its desire to review only those cases that will have an impact far beyond the parties involved. Moreover, Congress will soon take definitive action on the very issue present in this matter. Once Congress passes Senate Bill 1580, any decision in this case will lose all

precedential value. Also, the insurance exception issue present in this case makes it a bad vehicle for this Court to clarify the scope of ERISA preemption. The unique facts present in this case will limit whatever precedential impact a decision by this Court may have.

If this Court decides to grant certiorari, it should affirm the Nevada Supreme Court's order because the order comports with other federal case law in this area and with Congressional intent. American is a compensated surety who voluntarily undertook the obligation it now seeks to avoid. No provision of ERISA prohibits an ERISA plan from collecting sums contractually due on a voluntarily issued surety bond. An attempt to collect such a sum does not raise a legitimate preemption claim. In fact, any state court decision that exempted ERISA plans from benefitting under the contractor licensing statutes would violate the ERISA preemption provision by "singling out" ERISA plans for special (and detrimental) treatment. ERISA's legislative history demonstrates that Congress intended to retain, for ERISA plans, state remedies that facilitate recovery of delinquent contributions. Further, if NRS 624.270 and 624.273 are seen as "related to" ERISA plans because of the coverages they mandate, they and the related provisions of Nevada's insurance code, NRS 691A.010 and 691.030, are triggered, and with them, ERISA's exemption of state

laws regulating insurance from its broad preemption provision.

DATED this 22nd day of June, 1994.

Respectfully submitted,

MORRIS BRIGNONE & PICKERING
1203 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

By _____
Kristina Pickering

Attorneys for Respondents

Trustees of the Carpenters for Southern Nevada Health and Welfare Trust; Trustees of the Construction Industry and Carpenters Joint Pension Trust for Southern Nevada; Trustees of the Vacation Trust Carpenters Union No. 1780; and Trustees of the Southern Nevada Carpenters and Millwrights Apprenticeship Training Trust

APPENDIX A

103d Congress
1st Session

S. 1580

To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

October 21 (legislative day, October 13), 1993
Mr. Specter introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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A BILL

To provide that the Employee Retirement Income Security Act of 1974 does not preempt certain State laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ERISA PREEMPTION RULES NOT TO APPLY TO CERTAIN ADDITIONAL STATE LAWS.

Section 514(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end the following new paragraph:

"(9) Subsection (a) shall not apply to--

"(A) any provision of State law to the extent that such provision requires the payment of prevailing wages, including employee benefits, on public projects and permits any prevailing employee benefit plan contribution or cost requirement of such law to be met by crediting--

"(i) the payment of employee benefit plan contributions or costs,

"(ii) the payment of wages in lieu of such contributions or costs, or

"(iii) the payment of a combination of wages and such contributions or costs;

except that this subparagraph shall not be construed to exempt from subsection (a) any such provision to the extent it otherwise mandates the maintenance of, or otherwise regulates the benefits or operations of, any employee benefit plan;

"(B) any provision of State law to the extent that such provision--

"(i) establishes minimum standards for the certification or registration of apprenticeship or other training programs,

"(ii) concerns the establishment, maintenance, or operation of a certified or registered apprenticeship or other training program, or

"(iii) makes certified or registered apprenticeship or other training an occupational qualification,

and does not conflict with any right, requirement, or duty established under this title; or

"(C) any provision of State law to the extent that such provision provides for a mechanics' lien or other lien, bonding, or other security for the collection of delinquent contributions to a multiemployer plan.".

SEC. 2. EFFECTIVE DATE.

The amendment made by section 1 shall take effect on the date of the enactment of this Act and shall apply to matters with respect to which actions are pending on or after such date.

APPENDIX B

1ST REFERENCE of Level 1 printed in FULL format.

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MARCH 14, 1994

1994 DLR 48 d18

LENGTH: 585 words

SECTION: CURRENT DEVELOPMENTS.

TITLE: KENNEDY GIVES STRONG ENDORSEMENT OF BILL THAT WOULD PRE-EMPT ERISA.

TEXT:

Senate Labor and Human Resources Committee Chairman Sen. Edward Kennedy (D-Mass) March 10 said his panel will move quickly to approve a bill that would give states authority to set prevailing wages and certain apprenticeship training standards on publicly funded projects without being subject to pre-emption by the Employee Retirement Income Security Act.

The measure (S 1580) picked up the endorsements of Sen. Harris Wofford (D-Pa) and Kennedy, who said ERISA's pre-emption of such authority "is like an axe held over the necks of working men and women." The bill (HR 1036) passed the House Nov. 9 by a vote of 276 to 150 (216 DLR A-8, 11/10/93).

During a committee hearing on the Senate measure March 10, proponents of the bill said ERISA's pre-emptive authority has taken away the states' right to mandate a

minimum wage for public works projects or to govern apprenticeship and education programs.

Sen. Arlen Specter (R-Pa), who sponsored the bill with Sen. Alfonse D'Amato (R-NY), testified that prevailing wage laws, which are in effect in 31 states "protect local wage standards, promote fair competition among bidders, and maintain quality work standards for public works projects."

Kennedy and Specter also contended that prevailing wage laws existed long before the enactment of ERISA. "Recent court decisions that have upheld ERISA's preemptive authority over state prevailing wage laws defy logic and are unwarranted and unjustified," according to Kennedy.

Bill Would Exempt Mechanics' Lien Laws

The bill also proposes to exempt state mechanics' lien laws, which grant individuals who perform services a lien on the property to secure payment for their work. The mechanics' liens and other similar remedies are a means for collecting delinquent contributions to multiemployer plans.

Supporters of the bill include the AFL-CIO, the Labor Department, and the National Association of State Apprenticeship Directors.

State prevailing wage laws guarantee that workers performing public work do not have to accept wages below the rate paid to workers on private worksites in the same locality, according to John Hudacs, commissioner of the New York State Department of Labor, who testified on

behalf of the National Association of Government Labor Officials.

Those who testified against the bill said ERISA's pre-emptive authority allows employers to provide a uniform set of benefit plans for their workers without being subject to varying and often conflicting state laws.

Mark Thierman, of Thierman Law Partnership of San Francisco, Calif., who testified on behalf of the Associated Builders and Contractors, said "Construction industry employers, both union and nonunion, offer a wide variety of benefits to their employees. The successful administration of these benefits would be severely handicapped if construction employers were subjected to divergent state and local regulations of these benefit plans."

Other critics of the bill say the proposal would allow states to establish discriminatory restrictions on competing nonunion training programs. - Theirman said union-controlled state apprenticeship councils would have complete authority to refuse to certify qualified open shop programs.

Leo Garcia, who spoke on behalf of The Associated General Contractors of America, said removing ERISA's pre-emption mandate would further "exacerbate the competitive disadvantage of the open shop sector of the construction industry on prevailing wage projects."

LANGUAGE: ENGLISH

APPENDIX C

3RD REFERENCE of Level 1 printed in FULL format.

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BNA Pension & Benefits Reporter

Vol. 21, No. 16; Pg. 771

April 18, 1994.

LENGTH: 422 words

SECTION: NEWS QUALIFICATION: Preemption.

TITLE: SENATE PANEL CLEARS BILL TO BAR STATE PREVAILING WAGE LAWS FROM ERISA.

TEXT:

The Senate Labor and Human Resources Committee approved a bill April 13 that would give states authority to set prevailing wages and certain apprenticeship training standards on publicly funded projects without being subject to preemption by the Employee Retirement Income Security Act.

The committee cleared the bill (S 1580, HR 1036) by a vote of 10 to 7. In a statement released at the hearing, committee Chairman Edward Kennedy (D-Mass) stressed the importance of expediting the passage of the bill by the Senate because recent court decisions in many states "have gone far beyond the original intent of ERISA, and vastly extended the reach of the preemption provisions."

ERISA was enacted in 1974 to apply a national standard to protect workers' health and welfare benefits.

The law preempts state laws relating to employee benefit plans.

During a committee hearing on the measure March 10, Kennedy said court decisions that have upheld ERISA's preemptive authority over state prevailing wage laws "defy logic and are unwarranted and unjustified" (20 BPR 552).

State prevailing wage laws, in effect in 31 states, have been successfully challenged and overturned in New York and Washington, Kennedy said in his statement. In Pennsylvania, Oklahoma, California, and Montana, they have been overturned in lower courts, and decisions in higher courts are pending, he added.

The bill also would allow states to set standards for apprenticeship training programs, which have been preempted by ERISA in recent court decisions in California, Minnesota, and Oklahoma, Kennedy said.

Congress intended ERISA to regulate the disclosure and reporting requirements of their programs, "but we did not intend to interfere with the long-established federal-state joint partnership regulating state apprenticeship programs," according to Kennedy.

The bill also would exempt from ERISA preemption state mechanics' lien laws, which grant individuals who perform services a lien on property to secure payment for their work. The mechanics' liens and other similar remedies are a method of collecting delinquent contributions to multiemployer plans.

Supporters of the ERISA bill include the AFL-CIO, the Labor Department, and the National Association of State Apprenticeship Directors.

Opponents of the bill, including the National Association of Manufacturers, say ERISA's preemptive authority allows employers to provide a uniform set of benefits for their workers without being subject to varying and often conflicting state laws.

LANGUAGE: ENGLISH